

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, } NO. CR-07-0086-LRS
Plaintiff, }
v. }
JOHN VIGIL, }
Defendant. }
MEMORANDUM OPINION
RE CAREER OFFENDER
DESIGNATION

A sentencing hearing was held in this matter on April 8, 2008. Jared C. Kimball, Esq., appeared for the United States. Terence M. Ryan, Esq., appeared for the Defendant.

The court found that Defendant is a “career offender” pursuant to the Sentencing Guidelines, U.S.S.G. §4B1.1(a), and therefore, that his Total Adjusted Offense Level is 34, his Criminal History Category is VI, and his advisory guideline sentencing range is 262-327 months imprisonment. Notwithstanding that advisory guideline range, this court imposed a non-guideline sentence of 132 months imprisonment for Defendant’s Armed Robbery conviction (Count 1) and a concurrent sentence of 120 months on Defendant’s Attempted Witness Tampering conviction (Count 2), based on consideration of the factors set forth in 18 U.S.C. §3553(a). This memorandum opinion memorializes the court’s determination regarding the career offender designation.

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**MEMORANDUM OPINION RE
CAREER OFFENDER DESIGNATION - 1**

1 **I. INTRODUCTION**

2 A “career offender” is a defendant who has at least two prior adult felony
 3 convictions of either a crime of violence or a controlled substance offense.
 4 “Crime of violence” is defined as any offense under federal or state law,
 5 punishable by a term of imprisonment exceeding one year, that: (1) has as an
 6 element the use, attempted use, or threatened use of physical force against the
 7 person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use
 8 of explosives, or otherwise involves conduct that presents a serious potential risk
 9 of physical injury to another. U.S.S.G. §4B1.2(a).

10 **II. DISCUSSION**

11 **A. 2000 Spokane County Superior Court Third Degree Assault
 12 Conviction**

13 Defendant pled guilty to an Amended Information charging him with Third
 14 Degree Assault in violation of RCW 9A.36.031(1)(f) in that the Defendant “did
 15 with criminal negligence, cause bodily harm to S. G., which was accompanied by
 16 substantial pain that did extend for a period sufficient to cause considerable
 17 suffering.”¹

18 The Ninth Circuit Court of Appeals has held that Third Degree Assault in
 19 the State of Washington is not categorically a “crime of violence.” Under the
 20 categorical approach, the court normally looks only to the fact of conviction and
 21 the statutory definition of the prior offense. *Taylor v. United States*, 495 U.S. 575,
 22 602, 110 S.Ct. 2143 (1990). In *United States v. Sandoval*, 390 F.3d 1077, 1081 (9th
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25 ¹ Under Washington law, a person acts with criminal negligence “when he
 26 fails to be aware of a substantial risk that a wrongful act may occur and his failure
 27 to be aware of such substantial risk constitutes a gross deviation from the standard
 28 of care that a reasonable man would exercise in the same situation.” RCW
 9A.08.010(1)(d).

1 Cir. 2004), the Ninth Circuit held that under the categorical approach, Third
 2 Degree Assault does not qualify as a “crime of violence” as that term is defined in
 3 U.S.S.G. §4B1.2(a), because under Washington law, it is possible to commit Third
 4 Degree Assault “through an unlawful touching that does not involve substantial
 5 physical force or seriously risk physical injury.” Therefore, the court must resort
 6 to a modified categorical approach to determine whether a particular Third Degree
 7 Assault conviction amounts to a conviction for a “crime of violence.” The
 8 modified categorical approach allows the court to go beyond the statute that
 9 defines Third Degree Assault and determine if the offense is a “crime of violence”
 10 based on consideration of court records including a charging document, a
 11 transcript of the plea colloquy, a written plea agreement presented to the court, “or
 12 a record of comparable findings of fact adopted by the defendant upon entering the
 13 plea.” *Shepard v. United States*, 544 U.S. 13, 20-21, 26, 125 S.Ct. 1254 (2005).²
 14 “[D]ocuments used to satisfy a modified-categorical analysis must meet a
 15 ‘rigorous standard.’” *United States v. Navidad-Marcos*, 367 F.3d 903, 908 (9th Cir.
 16 2004). “[M]ight simply cannot be enough.” *Id.* The government must
 17 demonstrate that the record “unequivocally establishes that the defendant was
 18 convicted of” a “crime of violence.” *Id.*

19 In his “Statement Of Defendant On Plea Of Guilty” filed in Spokane County
 20 Superior Court, the Defendant indicated as follows: “I was with some people who
 21 assaulted a young man. I caused a cigarette burn, and walked downtown with

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23 ² Under the modified categorical approach, the court considers whether any
 24 of a limited set of specific documents, including “the state charging document, a
 25 signed plea agreement, jury instructions, guilty pleas, transcripts of a plea
 26 proceeding and the judgment,” show the petitioner’s conviction entailed an
 27 admission to, or proof of, the necessary elements of a crime of violence.
Hernandez-Martinez v. Ashcroft, 343 F.3d 1075, 1076 (9th Cir. 2003).

1 him.” This statement unequivocally establishes that Defendant’s conviction for
 2 Third Degree Assault involved the use of substantial physical force against the
 3 person of another and/or involved conduct that presented a serious potential risk
 4 of physical injury to another. Furthermore, although Defendant was charged with
 5 criminal negligence, his statement unequivocally establishes that his use of force
 6 was intentional. See *Leocal v. Ashcroft*, 543 U.S. 1, 9, 125 S.Ct. 377 (2004) (“use
 7 . . . of physical force against the person or property of another,” most naturally
 8 suggests a higher degree of intent than negligent or merely accidental conduct);
 9 *Fernandez-Ruiz v. Gonzalez*, 466 F.3d 1121 (9th Cir. 2006) (“bedrock principle of
 10 *Leocal* is that to constitute a federal crime of violence an offense must involve the
 11 intentional use of force against the person or property of another”).

12 Defendant’s 2000 Third Degree Assault conviction under RCW
 13 9A.36.031(1)(f) was for a “crime of violence” as that term is defined in U.S.S.G.
 14 §4B1.2(a).

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16 **B. 2002 Spokane County Superior Court Riot And Third Degree**
 17 **Assault Convictions**

18 The Defendant pled guilty to an Amended Information charging him in
 19 Count 1 with Riot in violation of RCW 9A.84.010, and in Count 2 with Third
 20 Degree Assault in violation of RCW 9A.36.031(1)(g) (assaulting a law
 21 enforcement officer or other employee of a law enforcement agency who was
 22 performing his or her official duties at the time of the assault). The Government
 23 acknowledges that the convictions on these two offenses are not counted
 24 separately because Defendant was not sentenced separately on the two
 25 convictions. U.S.S.G. §4B1.2(c). Therefore, they must be considered as a single
 26 felony in determining whether that felony constitutes a “crime of violence.”

27 Third Degree Assault is clearly a felony punishable by a term of
 28 imprisonment exceeding one year. It is a Class C Felony punishable by a

1 maximum term of imprisonment of five years. RCW 9A.36.031(2); RCW
2 9A.20.021(1)(c).³ Riot can be charged either as a gross misdemeanor or as a
3 felony. In Defendant's case, it was charged in the Amended Information as a
4 felony because of the use of a deadly weapon. "The crime of riot is a Class C
5 Felony if the actor is armed with a deadly weapon." RCW 9A.84.010(2)(b). A
6 Class C Felony carries a maximum term of five years imprisonment. RCW
7 9A.20.021(1)(c). Apparently, a standard sentencing guideline range for Riot has
8 not been established in the State of Washington and hence, pursuant to RCW
9 9.94A.505(2)(b), the court is to impose a "determinate sentence which may not
10 include more than one year of confinement." This was reflected in Defendant's
11 "Statement Of Defendant On Plea Of Guilty" in which the standard sentencing
12 range was specified as 0-12 months. (Attachment D to Ct. Rec. 142 at p. 29). The
13 statement, however, also reflected that the statutory maximum term of
14 imprisonment was five years and furthermore, RCW 9.94A.505(2)(b) specifically
15 authorizes a court to "impose a sentence which provides more than one year of
16 confinement if the court finds reasons justifying an exceptional sentence as
17 provided in RCW 9.94A.535." Although Defendant received a term of 12 months
18 on both the Third Degree Assault (Count 1) and the Riot (Count 2) convictions, to
19 run concurrently, both felony convictions were clearly punishable by a term of
20 imprisonment exceeding one year.

21 As noted, Third Degree Assault is not categorically a crime of violence
22 because one can be convicted of that offense for a mere unlawful touching as
23 opposed to conduct involving substantial physical force or which seriously risks
24 physical injury. Nor is Riot categorically a "crime of violence" because one could

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27 ³ The standard State of Washington sentencing guideline range specified for
28 Defendant's Third Degree Assault conviction was 12 to 16 months. (Attachment
D to Ct. Rec. 142 at p. 29).

1 be convicted of that crime based on use or threat to use force against property as
 2 opposed to a person. Therefore, resort to the modified categorical approach is
 3 required.

4 The government relies on the police report that was prepared regarding the
 5 incident, doing so by virtue of a box the Defendant checked on his “Statement Of
 6 Defendant On Plea Of Guilty” which says: “Instead of making a statement, I agree
 7 that the court may review the police reports and/or a statement of probable cause
 8 supplied by the prosecution to establish a factual basis for the plea.”⁴ Defendant
 9 entered *Alford* pleas⁵, stating as follows:

10 These are “Alford” guilty pleas. I understand the evidence
 11 against me and should all that evidence be presented to a
 12 jury, there is a possibility that I could be convicted. I enter
 13 these free and voluntary guilty pleas to take advantage of
 14 the prosecutor’s recommendation and dismissals.

15 The police report (Attachment E to Ct. Rec. 142) indicates that the
 16 Defendant spit on the shirt of one of the arresting officers and admitted as much.
 17 This was the basis for the Third Degree Assault charge (assaulting a law
 18 enforcement officer who was performing his official duties at the time of the
 19 assault). As despicable as this conduct was, the court cannot find that it involved
 20 the use of substantial physical force against the officer, or that it seriously risked
 21 physical injury to the officer or to anyone else. The conduct amounted to an
 22 “offensive” and “unlawful touching” of a police officer, rather than “harmful”

23 ⁴ While police reports generally cannot be used in a modified categorical
 24 approach per *Shepherd*, they can be considered when the defendant stipulates to
 25 their use as a factual basis for supporting a plea. *U.S. v. Almazan-Becerra*, 482
 26 F.3d 1085, 1090-91 (9th Cir. 2007)

27 ⁵An *Alford* plea is one in which the defendant enters a plea of guilty for
 28 purposes of settling the criminal proceeding, but does not admit guilt. *North
 Carolina v. Alford*, 400 U.S. 25, 37, 91 S.Ct. 160 (1970).

1 conduct.⁶ Accordingly, this Third Degree Assault conviction does not constitute a
 2 “crime of violence.”

3 The police report indicates that a complaining witness identified Defendant
 4 as using a liquor bottle to hit the witness and another individual over their heads,
 5 requiring the other individual to receive medical treatment. The report indicates
 6 the Defendant threatened to kill the witness if he “snitched.” The report also
 7 indicates that other suspects used a metal broom handle and a mop handle to hit
 8 some of the victims. The report concluded there was sufficient probable cause to
 9 charge the six defendants with Riot as they were acting with three or more persons
 10 and they knowingly and unlawfully used or threatened to use force against persons
 11 or against property, and were armed with bottles and a metal broom. In Count 2 of
 12 the Amended Information to which the Defendant pled guilty, it was alleged that:
 13 “[D]efendant, John Robert Vigil, in the State of Washington, on or about January
 14 01, 2002, being armed with a deadly weapon, while acting with three or more

16 ⁶ In *Sandoval*, the Ninth Circuit, in concluding that under Washington law it
 17 was possible to commit Third Degree Assault through an unlawful touching that
 18 does not involve substantial physical force or seriously risk physical injury, cited
 19 to *State v. Hall*, 104 Wn.App. 56, 14 P.3d 884, 889 (2000). In *Hall*, the defendant
 20 was convicted of assault on law enforcement officers which including spitting on
 21 one of the officers. The Washington Court of Appeals noted there are three forms
 22 of assault, one of which is assault by actual battery, “battery” being “intentionally
 23 touching or striking someone in a harmful **or offensive** manner.” 14 P.3d at 888
 24 (emphasis added). A person can intend to commit battery by an “unlawful,
 25 unpermitted touching short of bodily harm.” *Id.* at 889. The court concluded the
 26 defendant produced no evidence controverting the State’s evidence of harmful or
 27 offensive conduct “with Deputy Methena (biting) and Officer Groseclose
 28 (spitting).” *Id.*, citing *State v. Humphries*, 21 Wn.App. 405, 409, 586 P.2d 130
 (1978). In *Humphries*, the Washington Court of Appeals upheld a defendant’s
 conviction for simple assault for spitting in the face of a police officer, noting that
 spitting can constitute a battery because although minor, it is bodily contact which
 is highly offensive.

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1 persons, did knowingly and unlawfully, participate in the use of force against
2 human beings . . . to-wit: a stick.” The “stick” could be a reference to either the
3 metal broom handle or a mop handle. Although the police report does not
4 conclusively indicate that Defendant used a metal broom handle or a mop handle,
5 it does indicate he used a bottle to beat a victim, and moreover that Defendant was
6 acting with three or more persons to use force against the victims. The police
7 report, in combination with the Amended Information, unequivocally establishes
8 that Defendant’s Riot conviction involved the use of substantial physical force
9 against others and seriously risked physical injury to others. Hence, it is a “crime
10 of violence” pursuant to U.S.S.G. §4B1.2(a).

11 The fact that Defendant entered an *Alford* plea to the charge is of no
12 consequence with regard to use of the modified categorical approach. The legal
13 implications of a plea are the same, that being an admission of the facts charged in
14 the Information, whether or not the defendant maintains his innocence. See *Suazo*
15 *Perez v. Mukasey*, 512 F.3d 1222, 1226-27 (9th Cir. 2008), and *U.S. v. Guerrero-*
16 *Velasquez*, 434 F.3d 1193, 1197 (9th Cir. 2006). Defendant pled guilty to an
17 Amended Information specifically charging him with use of force upon others by
18 means of a deadly weapon. The *Suazo Perez* case is significant because it
19 involves the same circumstances as here, namely a defendant who enters an *Alford*
20 plea checking a box on his “Statement Of Defendant On Plea Of Guilty”
21 indicating the court can use the underlying police report to determine if there is a
22 factual basis for the plea.

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24 III. CONCLUSION

25 The court concludes the Defendant has two prior adult felony convictions
26 for a “crime of violence:” the 2000 Third Degree Assault conviction and the 2002
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1 Riot conviction.⁷ Hence, the Defendant is a “career offender” under U.S.S.G.
2 §4B1.1 with an advisory guideline range of 262 to 327 months. That said, the
3 court has concluded that a non-guideline sentence of 132 months is appropriate
4 based on the 18 U.S.C. §3553(a) factors, including the fact that some “crimes of
5 violence,” including those of which the Defendant was previously convicted, are
6 clearly less violent than other “crimes of violence.”

7 The District Court Executive shall provide copies of this Memorandum
8 Opinion to counsel and to the U.S. Probation Office.

9 **DATED** this 10th day of April, 2008.

10 *s/Lonny R. Sukko*
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12 LONNY R. SUKO
United States District Judge
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23 ⁷ The fact the 2002 Third Degree Assault conviction is not a “crime of
24 violence” has no bearing on whether the Riot conviction is a “crime of violence”
25 since although those matters were charged together, they clearly involve distinct
26 conduct.
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